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In the Supreme Court of the United States

OCTOBER TERM, 1929.

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Appellant,

vs.

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Appeal from the Supreme Court of the State of Ohio.

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THE GAYLE LEGAL PUBLISHING CO., CLEVELAND, O.

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BRIEF FOR APPELLEES.

PREFACE.

The issues presented, and points to be argued in this case are the same as those in the case of *State of Ohio, ex rel. Pauline Wadsworth, appellant vs. John A. Zangerle, Auditor of Cuyahoga County, appellee,* being the next succeeding case on the docket of this Court for the 1929 term and bearing No. 238.

The following brief has been prepared in collaboration with counsel in that case and has been changed only in recitals of fact as required by the record.

STATEMENT.

This is a proceeding on appeal from a decision of the Supreme Court of the State of Ohio, and involves the alleged unconstitutionality of certain Acts of the Legislature of the State of Ohio, by virtue of which the Metropolitan Park District in Akron, Ohio, was created, and further challenges the validity of a certain provision of the Constitution of the State of Ohio, in relation to matters of procedure of the Supreme Court of that State.

Jurisdiction of the Supreme Court of the United States is sought, under favor of U. S. Code, Title 28, Section 237, as modified by Section 861-A, (Act of January 31, 1928, Chapter 14, 45 Statutes, 54), and Section 861-B, (Act of April 26, 1928, Chapter 440, 45 Statutes, 466, U. S. C. Title 28, Sec. 344), upon the asserted claim that the suit is one wherein a title, right, privilege or immunity is specially set up or claimed under the Constitution.

HISTORY OF LITIGATION.

On December 29th, 1926, the Appellant as Plaintiff, filed his action in the Court of Common Pleas of Summit County, Ohio, seeking to enjoin the Board of Park Commissioners of the Akron Metropolitan Park District and Jacob Mong, County Auditor, from levying and collecting taxes, then in process of being levied. The appellant, as a taxpayer, asks that the collection of taxes be enjoined on the ground that the statutes of Ohio, by virtue of which the Park Board was created, were invalid in that they were in contravention of certain provisions of the Constitution of the State of Ohio.

Issues were joined on the amended petition and the answer thereto. On hearing, a decree was entered dismissing the petition. Plaintiff carried the cause, on error, to the Court of Appeals of the Ninth Judicial District,

where the decree of the lower court was affirmed. Thereafter error proceedings were prosecuted by plaintiff to the Supreme Court of the State of Ohio, as a matter of right, upon the theory that the case involved the constitutionality of certain statutes. A hearing in that court resulted in an affirmance of the judgment of the Court of Appeals.

The affirmance was effected by two of the seven judges of the Supreme Court of Ohio, and by virtue of Section 2, Art. 4 of the Constitution of Ohio providing that all of the judges of the Supreme Court except one must concur in order to hold a statute unconstitutional, except in the affirmance of a judgment of the Court of Appeals holding the statute unconstitutional. Five judges refused to concur.

After the judgment of affirmance was entered in the Supreme Court a motion was filed by plaintiff asking for the vacation of the judgment as entered and that judgment be entered according to the opinion of the five judges who refused to concur. This motion was overruled without the dissent of any judge.

This appeal is prosecuted upon the theory that there have been drawn in question, in the highest court in the State of Ohio, certain statutes, as being in conflict with provisions of the Constitution of the United States, and that the Court of the state held in favor of their validity. Further the appeal is apparently prosecuted on the theory that plaintiff has been denied a right, privilege or immunity, claimed by him, and that the same was decided adversely to him.

This brief is respectfully submitted, in opposition to the statement of the Appellant, disclosing the basis on which it is contended that this Court has jurisdiction. By an entry made by this Court October 28, 1929, consideration of its jurisdiction was postponed until final hearing. This brief is also offered in opposition to the brief of the Appellant upon the merits of the cause.

SUBJECT OF THE SUIT.

The Constitutionality of the provisions of the Ohio Statutes (Gen. Code Sections 2976-1 to 2976-10i) which have brought into existence the Akron Metropolitan Park System is challenged and if adversely decided will destroy an object of great public interest and benefit.

The act was passed by the Legislature of the State of Ohio, March 6, 1917, and was amended to grant further powers in 1920; in order to provide for the preservation of natural resources, and to furnish areas to be used generally by the citizens of the district, for recreational purposes.

Since the creation of the Akron Metropolitan Park Board eight years ago it has acquired approximately 700 acres of land. Much of this has been donated to it. Under the provisions of the enactment, by virtue of which it operates, it has once submitted to the electors of the Park District the question of a special tax levy, which was authorized by a substantial majority. Much of the area acquired has been improved by planting and constructing parkways. The project has already made for itself an important place in the public interest.

CONSTITUTIONAL VIOLATIONS COMPLAINED OF.

Presenting these in the chronological order in which they appear in the record, it is found that three violations contended for arise out of issues, if at all, as to whether the Park District Act violates the Federal Constitution in the following respects:

1. It is contended that this act works a denial of republican form of government.

2. It is contended that it denies the equal protection of the laws.

3. It is contended that it operates to deny due process of law.

4. The fourth arises on a "motion to vacate judgment," addressed to the Supreme Court of the State of Ohio, after its judgment was entered, and attacks the provision of the Constitution of the State of Ohio (Sec. 2, Art. 4) by which all but one of the judges of that court must concur in order to hold a statute unconstitutional, unless in affirmance of a judgment of the court of appeals holding such statute unconstitutional. The attack on Sec. 2, Art. 4 of the Constitution of Ohio, includes two of the same alleged conflicts with the Federal Constitution, viz:

a. That Sec. 2 of Art. 4 works a denial of republican form of government.

b. That it works a denial of the equal protection of the laws.

Appellees will contend that the question of conflict with the Federal Constitution, by the Ohio Park District Act, is not adequately presented in the record and has never been passed on by the courts of the State of Ohio.

The allegations of the amended petition on which the issue is predicated, are three only and are as follows:

a. After a long paragraph of disconnected averments, it is said:

> "All of which is contrary to and in violation of the fundamental law of the land; the Constitution of Ohio, and the Constitution of the United States, that taxation and representation are inseparable." (R. 16)

b. The Park District Act complained of was passed in 1917 and amended in 1919. (R. 14) On April 17, 1925, by an act only remotely related, Township Parks were authorized. The petition (See R. 16) avers that

> "none of the electors or citizens of township, other than Twinsburg Township, Summit County, can avail themselves of the right conferred by the act of April 17, 1925, 111 Ohio Session Laws, 504, as said act cannot be given uniform operation throughout Summit

County, by reason of the establishment of the aforesaid Park District, which violates * * * the Constitution of Ohio, and constitutes a denial of the equal protection or benefit of the laws guaranteed by Section One of the 14th Amendment to the Constitution of the United States."

c. Plaintiff

"Appeals to a court of equity to prevent said acts being done all of which are contrary to the aforesaid provisions of the Constitution and the fundamental law of the land." (R. 17)

The petition in error filed in the Court of Appeals complains of the "judgment," "violating fundamental law of the land," and that the "judgment denied the plaintiff in error of the protection of the constitutional provisions set forth in the petition." (R. 11, Secs. 4th and 5th)

The petition in error filed in the Supreme Court of Ohio makes none other allegation than that "constitutional questions are involved."

The opinion of the Chief Justice of the Supreme Court of Ohio makes no mention of a federal constitutional question. (R. 21, *et seq.*, 120 O. S. 464, 166 N. E. Rep. 407.) No journal entry makes mention of a Federal Constitutional issue.

Indeed, in the motion to vacate the judgment of the Supreme Court, we find the questions seriously presented for the first time. Here plaintiff in error admits its novelty by alleging:

"that this court, like the lower court, failed to pass upon the constitutionality of Secs. 2926-10 and 2926-10h, G. C. or determine whether said Park District Act violates the Federal Constitution, and fails to state on its journal entry that no Federal question is presented, deciding or involved in this controversy." (R. 41)

A fair construction of the meager statements in the petition, and petitions in error, together with the journal

entries and opinion of the court, must lead to the conclusion that the several state courts either regarded the allegations as too indefinite to create an issue, or that the contention was waived by plaintiff.

The fourth violation complained of by appellee as set out above goes to a *title, right, privilege* or *immunity,* set up or claimed under the Constitution and adversely decided. This alleged violation of rights under the Federal Constitution was not raised on a motion for a rehearing, nor on a joinder of issues but on a motion to vacate a judgment rendered by the concurrence of two judges, and seeking to have substituted therefor the opinion of the five nonconcurring judges, as the judgment of the court. (R. 39) This motion to vacate was filed May 25, 1929, whereas the judgment was entered Mar. 27, 1929.

ARGUMENT.

It will therefore be argued as to all of these four points that (a) they were not timely asserted upon the record, and (b) that no substantial Federal question is presented.

The three alleged violations of Federal Constitutional rights are:

1. Denial of a republican form of government.
2. Denial of the equal protection of the laws.
3. Denial of due process of law.

For convenience of treatment these three alleged grounds of Federal jurisdiction will be considered as follows:

I. The alleged denial of the assurance of a republican form of government effected by a judgment made possible through the challenged provisions of the State Constitution.

II. The alleged denial, by such a judgment, of the equal protection of the laws.

III. The alleged invalidity of the Park Board Acts as working a denial of the due process of law, of the equal protection of the laws, and of a republican form of government.

These in their order—

POINT I.

THE ASSERTED GROUND THAT JUDGMENT OF STATE SUPREME COURT, MADE POSSIBLE THROUGH PROVISIONS OF STATE CONSTITUTION, LIMITING ITS POWER TO DECLARE LAWS UNCONSTITUTIONAL, DENIES REPUBLICAN FORM OF GOVERNMENT, IS UNAVAILING, BECAUSE

(a) It was not timely asserted upon the record;

(b) It presents no substantial Federal question.

(a)

It Was Not Timely Asserted.

As heretofore stated, this ground was not asserted in any of the pleadings, nor contended for until after the final judgment herein sought to be reviewed. It was made the subject of a pretended ground, and asserted for the first time in a motion to vacate the judgment. It is probable that a motion to vacate a judgment raises no more extensive issues than a motion to rehear.

It will be noted from the record, page 8, that this motion was overruled, and nothing further appears as to the entry. It is our contention that a denial of this motion does not constitute a decision of the constitutional question by the State Supreme Court.

"Certain propositions must be regarded as settled.

* * * * *

(2) That the title, right, privilege, or immunity must be specially set up or claimed at the proper time and in the proper way.

(3) That such claim can not be recognized as properly made when made for the first time in a petition for a rehearing after judgment."

Sayward v. Denny, 158 U. S., at 183.

"If the question is not properly reserved in the State Court the deficiency can not be supplied in either the petition for a rehearing after judgment or the assignment of errors in this court. * * *"

Harding v. Illinois, 196 U. S. 78.

"In order to give this court jurisdiction to review the judgment of the state court it must appear that some federal right, privilege or immunity was specially set up in the state court, passed on and denied."

Consolidated Turnpike Company v. Norfolk & Ocean View Railway Co., 228 U. S. 326.

"A mere assertion in a state court of a right under the Constitution of the United States, in a petition for rehearing, affords no ground for invoking the jurisdiction of this court unless the court below, in dealing with the petition, considers and passes upon the Federal ground therein relied upon."

Bowe v. Scott, 233 U. S. 658.

"An attempt to raise federal questions through an application to file a second petition for rehearing in the state court, comes too late."

Bilby, et al. v. Stewart et al., 246 U. S., 255.

"The settled rule is that in order to give it jurisdiction to review the judgment of a state court upon writ of error, the essential federal question must have been especially set up there at the proper time and in the proper manner; and further, that if first presented in a petition for rehearing, it comes too late unless the

court actually entertains the petition and passes upon the point."

Godchaux Company, Inc. v. Estopinal, et al., 251 U. S., 179, 181.

The rule of the Court, as stated by Chief Justice Taft, in *Tidal Oil Company, et al., v. Flannagan*, 263 U. S., 444, 455, is as follows:

> "This court has always held it a prerequisite to the consideration here of a Federal question in a case coming from a state court, that the question should have been raised in that court before decision, or that it should have been actually entertained and considered upon petition to rehear. *A mere denial of the petition by the state court without opinion, is not enough.*" (Italics ours)

From these authorities, it would seem to follow that the question was not properly or timely presented to the Supreme Court of Ohio, and not disposed of by it.

It matters not, in our judgment, what the pleading filed seventy days after judgment was called, whether a motion to vacate the judgment or for rehearing. It was overruled and there is nothing on the record disclosing the grounds of that action. No opinion was rendered, hence there is nothing on the record presented upon which jurisdiction of this Court can be based.

Suppose we admit that the question could not have been raised at an earlier time or in any other way. Does it follow that the Supreme Court of Ohio passed upon the conflict between Sec. 2, Art. 4 of the Ohio Constitution, and the Federal Constitution? Is it not more logical to believe that the Supreme Court of Ohio held that it was a court of limited jurisdiction, having only the powers granted it, and that it could not enlarge its powers and jurisdiction by holding invalid, a limitation placed upon its powers? Such holding is in harmony with what the court held in *State, ex rel.*

Jones, v. Zangerle, 117 O. S. 507, 159 N. E. Rep. 564, wherein the court said that "the fault lies, not in the court, but in the constitutional provision." The court has referred to its inability to do otherwise in the following decisions:

Fullwood v. Canton, 116 O. S. 732, 158 N. E. Rep. 171;

Meyers v. Copelan, 117 O. S. 622, 160 N. E. Rep. 855;

Board of Education v. Columbus, 118 O. S. 295, 160 N. E. Rep. 902.

The determination of its own jurisdiction by a state court is conclusive on this Court.

Standard Oil Co. v. Missouri, 224 U. S. 270, 281.

The decision of *Fullwood v. Canton, supra,* wherein it appears that the divided action of the Supreme Court of Ohio was probably sought to be taken advantage of on a writ of error filed in this Court, held that no federal question was presented.

Fullwood v. City of Canton, 275 U. S. 484, 48 S. Ct. Rep. 31.

(b)

It Presents no Substantial Federal Question.

As to the merit of the claim that the judgment of the State Supreme Court, made possible by the limitations of the provisions of the State Constitution, affecting the State Court's power to declare laws unconstitutional, denies to the litigant a republican form of government, it would seem sufficient to say that this Court has decided and declared that it has no jurisdiction to enforce the guaranty of a republican form of government assured by Section 4 of Article IV of the Federal Constitution, for the reason that what constitutes a republican form of government within this clause of the Federal Constitution is a political ques-

tion, which is solely for the consideration, determination and enforcement by the Congress.

"The enforcement of the provision in Section 4 of Article IV of the Constitution that the United States shall guarantee to every State a republican form of government is of a political character and exclusively committed to Congress, and as such is beyond the jurisdiction of the courts."

Pacific States Telephone and Telegraph Co. v. Oregon, 223 U. S. 118;

O'Neill v. Leamer, 239 U. S. 244 at 248;

State of Ohio ex rel. Davis v. Hildebrant, Secretary of State of Ohio, 241 U. S. 565 at 569.

Forsyth v. Hammond, 166 U. S. 506, (at page 519):

"It may be true that the general rule is that the determination of the territorial boundaries of a municipal corporation is purely a legislative function, but there is nothing in the Federal Constitution to prevent the people of a State from giving, if they see fit, full jurisdiction over such matters to the courts and taking it entirely away from the legislature. The preservation of legislative control in such matters is not one of the essential elements of a republican form of government which, under section 4 of Article 4 of the Constitution, the United States are bound to guarantee to every State in this Union. And whenever the Supreme Court of a State holds that under the true construction of its constitution and statutes the courts of that State have jurisdiction over such matters, the Federal courts can neither deny the correctness of this construction nor repudiate its binding force as presenting anything in conflict with the Federal Constitution."

Mountain Timber Co. v. State of Washington, 243 U. S. 219 (at page 234):

"It is urged that the law violates §4 of Article IV of the Constitution of the United States, guaranteeing to every State in the Union a republican form

of government. As has been decided repeatedly, the question whether this guaranty has been violated is not a judicial but a political question, committed to Congress and not to the courts."

POINT II.

THE ASSERTED GROUND OF A DENIAL OF EQUAL PROTECTION OF THE LAWS BY THE JUDGMENT OF THE STATE COURT MADE POSSIBLE THROUGH PROVISIONS OF STATE CONSTITUTIONS LIMITING ITS POWER TO DECLARE LAWS UNCONSTITUTIONAL IS UNAVAILING BECAUSE—

(a) It was not timely asserted upon the record;

(b) It presents no substantial Federal question.

(a)
It Was Not Timely Asserted.

What has heretofore been said under Section (a) of Point I of this brief, applies here, and if it should be contended that the decision upon the federal question *"arose out of the decision"* of the Supreme Court of Ohio, the history of the amendment of February 17, 1922, amending section 237 of the Judicial Code, (which was expressly repealed by the Act of February 13, 1925,) should be considered. In speaking of this amendment in the case of *Tidal Oil Co., et al., v. Flannagan, supra,* the Chief Justice said at page 454:

> "The intention of Congress was * * * to permit a review on writ of error in a particular class of cases in which the defeated party claims that his Federal Constitutional rights have been violated by the judgment of the state court itself, and further to permit the raising of the objection after the handing down of the opinion. * * *"
>
> "The question in such cases could not well be raised until the handing down of the opinion indicating

that the objectionable judgment was to follow. This act was intended to secure to the defeated party the right to raise the question here if the state court denied the petition for rehearing without opinion."

The amendment was for the purpose of changing the law. The amendment was expressly repealed. The law then reverted to its former state, and passing upon this phase of the history of the statute, the author of the text of *Montgomery's Manual of Federal Jurisdiction and Procedure,* Third Edition, in Section 1061, page 806, says:

> "From the rule that the federal question or assertion of federal right must have been presented or asserted in the state court, it resulted that, if the judgment of such court in and of itself worked a denial of constitutional right, the injured party was without remedy, unless the state court actually entertained and considered the question upon rehearing."

Thus it is that the law is now as it was before the amendment, and as the question was raised for the first time by the petition for rehearing, and the same was merely denied, the Federal question is not saved upon the record, since in the language of this court, "a mere denial of the petition by the state court without opinion, is not enough."

(b)

It Presents No Substantial Federal Question.

The provision of the Ohio Constitution under question is Article IV, Sec. 2 and is as follows:

> "No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void."

A provision of the State Constitution which applies uniformly to all citizens and residents of Ohio who desire

to contest the constitutionality of any statute does not deny equal protection of the laws. If it neither differentiates between citizens or residents, or classes thereof, nor between the citizens and residents within a district of the State, it does not work an inequality in the protection of the laws.

Mr. Justice Bradley, giving the opinion of the Court in the case of *Missouri v. Lewis,* 101 U. S. 22, at page 30, says:

> "Each State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities, and another for rural districts, one system for one portion of its territory, and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a State to regulate its internal affairs to deny to it this right. We think it is not denied or taken away by anything in the Constitution of the United States, including the amendments thereto. * * * If every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place, and under like circumstances.
>
> The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States, separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side, no such right. Each State prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist

in the several States, without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State. A uniformity which is not essential as regards different States can not be essential as regards different parts of a State, provided that in each and all there is no infraction of the constitutional provision. Diversities which are allowable in different States are allowable in different parts of the same State.

Where part of a State is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions,—trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts and a peculiar arrangement of jurisdictions. It would be an unfortunate restriction of the powers of the State government if it could not, in its discretion, provide for these various exigencies."

In the event the Constitution of Ohio had no provision for a review whatsoever by the State Supreme Court of the judgments of the several courts of appeal (each being of limited and distinct territorial jurisdiction), there would be no denial of the guaranty of equal protection of the laws, notwithstanding that the effect of the absence of such a provision might be that statutes would be enforced in certain counties of Ohio as constitutional, and ignored in others as unconstitutional; and clearly this would be true, even though there was nothing in the subject-matter of the statutes, in force or ignored, that on principles of classification afforded a basis for territorial discrimination. Justification for the enforcement of the statute in the one district, and for its being ignored in the other, so far as the Federal right is concerned, would be found in the fact that the Court of Appeals in the one district regarded the statute as constitutional, and that the Court of Appeals in the other district regarded it as unconstitutional.

If all of the courts of appeal in the State uphold the constitutionality of a given statute, their decisions are reviewed on the same basis by the Supreme Court. If all of the courts of appeal in the State hold a statute unconstitutional, those decisions are likewise reviewed on the same basis by the Supreme Court. The different bases of decision in the Supreme Court provided for by the amendment to the State Constitution only become operative when there is a divergence in the decisions of the courts of appeal, a divergence which the State of Ohio is under no Federal obligation to prevent or cure.

In view of the fact that the provision of the State Constitution under attack can only operate to preserve an existing divergence of decision among the lower courts, and can not create divergence where none existed below, it can not be said that the position of any citizen is any worse than it would have been if the State Constitution had denied the Supreme Court any power whatsoever to reverse or affirm unconstitutional decisions of the several lower courts.

There is no existent divergency of decision, and there can be no inequality, unless and until a discrimination is worked by the happening of a contingency which may never arise.

If all the courts of appeal should decide the same question, in the same way, there could in fact be no divergency, no discrimination, no inequality.

An individual cannot show discrimination until he can definitely point to one in whose behalf the law has been decided differently. The appellant in this case cannot so do, for no different decision has been made in any other court of appeals, and all individuals in her district are affected similarly.

The mere possibility that at some time some court of appeals may decide the question differently, and that the

Supreme Court may then affirm that decision, and that thereby a citizen in a different district will be affected differently than the appellant, is not enough to raise the constitutional question at this time. Such a question now is abstract and moot.

> "But the Court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which can not affect the result as to the thing in issue in the case before it."
>
> *California v. San Pablo and Tulare Railroad Company,* 149 U. S. 308 at 314.

> "It is the settled law of this court that one who would strike down a state statute as violative of the Federal Constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution."
>
> *Southern Railway Co. v. King,* 217 U. S. 524 at 534.

> "The plaintiff in error has no interest to assert that the statute is unconstitutional because it might be construed so as to cause it to violate the Constitution. His right is limited solely to the inquiry whether in the case which he presents the effect of applying the statute is to deprive him of his property without due process of law."
>
> *Castillo v. McConnico,* 168 U. S. 674, 680.

This rule is applied in *Board of Trade of the City of Chicago, et al. v. Olsen, et al.,* 262 U. S. 1, at page 43, wherein the court refused to consider the constitutionality of a statutory provision on the ground that the execution of the provisions of the act never operated so as to put the plaintiff in danger of suffering prejudice thereunder.

We submit that there is no discrimination, either as to persons or as to locality. The first is not debatable, and if there is a discrimination at all, it is between the various districts comprising the jurisdiction of the various courts of appeal. The division into districts of a state for the purposes of the administration of justice is legitimate, for as this Court decided in *Missouri vs. Lewis, supra,* the guaranty of the equal protection of the laws under the Fourteenth Amendment is given to individual citizens, and not to localities.

The provision of the State Constitution requiring the concurrence of six judges of the Supreme Court to deny the constitutionality of a State statute which has been upheld by a Court of Appeals, merely provides a method of review. It would, of course, have been entirely competent for the people of Ohio to provide in their Constitution that the decision of the Courts of Appeals on a constitutional question should be final. Instead of doing that, however, the people did provide that such a decision should be final *unless* it was reversed by the Supreme Court of the State, six judges concurring. Since it would have been competent for the Constitution to give entire finality to the decisions of the Courts of Appeals, it is difficult to see how this conditional finality can be held offensive to any restraint imposed by the Constitution of the United States.

For further illustration, if the Constitution of Ohio had provided that decisions of the Courts of Appeals should be final unless reversed by the unanimous decision of the Supreme Court, or by one more than a majority, or any other limitation of the same general character, it would merely have been tantamount to saying that the Courts of Appeals are to be the courts of final decision in Ohio unless their opinions are so clearly wrong that a unanimous judgment of reversal can be obtained from the Supreme Court.

It must be remembered that the judicial sections of the Constitution of Ohio were framed with the thought of cutting down the overburdened docket of the Supreme Court of the State and giving as much finality as possible to the decisions of the Courts of Appeals. Looked at in this light, it is merely an effort to give finality to the decisions of the Courts of Appeals, but at the same time providing an ultimate remedy which will not be resorted to except in cases of manifest and incontrovertible error.

The six to one proviso applies in *every* case in the Supreme Court in which a constitutional question is involved, *except only* a case in which the Court of Appeals has held a law unconstitutional. In other words, it applies to all cases involving constitutional issues which are in the Supreme Court in consequence of the original jurisdiction of the court, and not merely to cases before the court by virtue of its appellate jurisdiction. From this it follows that the six to one proviso is the *general* provision of the Constitution and the provision permitting the Court to act by a majority vote in upholding a decision of the Court of Appeals declaring a statute unconstitutional is in fact the exception thereto.

The equal protection clause of the Fourteenth Amendment does not prevent the application by a state of different laws and different systems of judicature to its various local subdivisions.

It must be conceded that it is the right of every state to establish such courts as it sees fit and to prescribe their several jurisdictions as to territorial extent, subject matter and amount and the finality and effect of their decisions. It must be conceded that a state may adopt any system of law or judicature it sees fit for all or any part of its territory, and the diversity of law which may result in the respective districts of the state do not constitute a denial of the equal protection of the laws within the meaning of the Fourteenth Amendment.

Appellant claims that Section 2 of Article IV of the Constitution of Ohio denies due process of law. It is not his contention that the judgment sustained the validity of a statute which itself denied due process of law. That is an entirely different question. Appellant's contention amounts to a claim that after a full and complete hearing in the trial court and one appellate court, a provision that in the event of a further appeal to the Supreme Court of the State on a constitutional question, the judgment of the Court of Appeals declaring a law constitutional shall not be reversed except with the concurrence of at least six of the judges of the Supreme Court, constitutes a denial of the due process of law *per se*, as a matter of procedure or of the jurisdiction of the Supreme Court of Ohio. Obviously this claim is without merit for all that is necessary to constitute due process of law as a matter of procedure is notice, fair opportunity to be heard, and the withholding of a decision until there has been a fair hearing. The right to a review is not essential to due process of law. Hence, the opportunity which is afforded to litigants in Ohio to contest all constitutional and other questions fully in the Common Pleas Court and again in the Court of Appeals satisfies all requirements of due process of law.

Reetz v. Michigan, 188 U. S. 505;
Pittsburgh, etc. Ry. Company v. Backus, 154 U. S. 421;
McKane v. Durstin, 153 U. S. 684, 687;
Rogers v. Peck, 199 U. S. 425, 429;
Plymouth Coal Company v. Pennsylvania, 232 U. S. 531.

Statutes are not to be declared unconstitutional unless they are clearly so, resolving all doubts in favor of the constitutionality of the statute and the requirement of the con-

currence of six of the seven judges is but a recognition of this principle.

The soundness of the logic of any contention is often judged by its resultant effect. If the claim of the appellant is to be sustained, the resultant effect would be that the Supreme Court of Ohio would be deprived of a part of its jurisdiction or its jurisdiction would be dictated by this Court's decree. This would be contrary to the accepted policy and law of the land to the effect that the manner of creation of a state Supreme Court, its jurisdiction and its procedure are matters over which the people of the state have exclusive jurisdiction.

> "And, as our decisions show, there is nothing in the clauses of the Fourteenth Amendment guaranteeing due process and equal protection which converts an issue respecting the jurisdiction of the state court under the Constitution and Statutes of the State into anything other than a question of state law, the decision of which by the state court of last resort is binding upon this court."

Gasquet v. Lapeyre, et al., 242 U. S. 367, at 369-70;

Iowa Central Ry. Company v. Iowa, 160 U. S. 389, 393;

Castillo v. McConnico, 168 U. S. 674, 683;

Rawlins v. Georgia, 201 U. S. 638;

Burt v. Smith, 203 U. S. 129, 135;

Standard Oil Company of Indiana v. Missouri, 224 U. S. 270, 280, 281;

DeBearn v. Safe Deposit and Trust Company, 233 U. S. 24, 34;

McDonald v. Oregon R. R. & Navigation Company, 233 U. S. 665, 669, 670;

Missouri v. Lewis, 101 U. S. 22, 30;

Mallett v. North Carolina, 181 U. S. 589;
First National Bank in St. Louis v. State of Missouri, 263 U. S. 640, 661;
American Ry. Express Co., v. Kentucky, 273 U. S. 269.

In *Standard Oil Company of Indiana v. Missouri,* 224 U. S. 270, 286, *supra,* Mr. Justice Lamar says:

> "But the power to render a final judgment must be lodged somewhere, and in every case a point is reached where litigation must cease. What that point is can be determined by the legislative power of the state for right of appeal is not essential to due process of law."

A limitation of the jurisdiction of the Supreme Court with respect to judgments rendered by the Courts of Appeals involves solely a question of state policy; this is whether the limitation took the form of vesting the Supreme Court with jurisdiction *only* to review decisions of the Courts of Appeals holding statutes unconstitutional—leaving the decision of the Courts of Appeals final in cases in which they had upheld the constitutionality of statutes—or by differentiating in the two classes of judgments by permitting the Supreme Court by a majority vote to affirm or reverse a judgment of a Court of Appeals holding a law unconstitutional and requiring more than a majority to reverse a judgment holding a law constitutional.

The following cases analogous to the situation presented in the leading case of *Missouri v. Lewis,* 101 U. S. 22, *supra,* are in accord with the decision in that case.

Hayes v. Missouri, 120 U. S. 68, holds that it is not a denial of equal protection to give to persons accused of crime in cities of a population of over 100,000, fifteen peremptory challenges to jurors while persons in other places are allowed only eight.

Gardner v. Michigan, 199 U. S. 325. Under the existing laws the method of selecting jurors was different in

Wayne County than in the rest of the State. Held not a denial of equal protection.

Chappell Chemical & Fertilizer Company v. Sulphur Mines Company, 172 U. S. 474. The Maryland constitution abridges the right of trial by jury in certain cases in the City of Baltimore. Held not to deny equal protection.

Hallinger v. Davis, 146 U. S. 314. Held not to be a denial of equal protection for a law to empower the court to take a case from the jury when a party pleads guilty to the crime of murder. In other murder cases, the jury determines the degree of the crime.

O'Campo v. U. S., 234 U. S. 91. Persons accused of crime who are tried before the court of first instance in Manila were denied the right to a preliminary examination given in all similar courts elsewhere. Held proper even though the act of Congress governing the Philippines guaranteed equal protection.

It is a familiar doctrine that courts shall not lightly disturb the enactment of the legislative branch of the government. One quotation will suffice,—by Harlan, *J.*, in *Henderson Bridge Company v. Henderson*, 173 U. S. 592, at 615:

> "As an act of Congress should not be declared unconstitutional unless its repugnancy to the supreme law of the land is too clear to admit of dispute, so a local regulation under which taxes are imposed should not be held by the courts of the Union to be inconsistent with the National Constitution unless that conclusion be unavoidable. All doubt as to the validity of legislative enactments must be resolved, if possible, in favor of the binding force of such enactments."

"Too clear to admit of dispute." Is the repugnancy too clear to admit of dispute when three of seven judges deny the repugnancy? Are the people of a state to be criticised for not wishing their legislative enactments to be

put to such a hazard? Are they not justified in adopting the principle expressed by Justice Harlan and making it operative through a requirement of more unanimity than a bare majority?

Furthermore, apart from the single inquiry into its legality, the wisdom or unwisdom of a legislative enactment or constitutional requirement is not a proper subject of judicial inquiry. This principle is expressed by Chief Justice White, in the case of *McCray v. United States*, 195 U. S. 27, at 53:

> "Whilst, as a result of our written Constitution, it is axiomatic that the judicial department of the government is charged with the solemn duty of enforcing the Constitution, and therefore, in cases properly presented, of determining whether a given manifestation of authority has exceeded the power conferred by that instrument, no instance is afforded from the foundation of the government where an act which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust. To announce such a principle would amount to declaring that, in our constitutional system, the judiciary was not only charged with the duty of upholding the Constitution, but also with the responsibility of correcting every possible abuse arising from the exercise by the other departments of their conceded authority. So to hold would be to overthrow the entire distinction between the legislative, judicial, and executive departments of the government, upon which our system is founded, and would be a mere act of judicial usurpation."

POINT III.

THE ASSERTED GROUND OF A DENIAL OF DUE PROCESS OF LAW, OF EQUAL PROTECTION OF THE LAWS, AND OF A REPUBLICAN FORM OF GOVERNMENT, BY REASON OF THE ALLEGED INVALIDITY OF THE VARIOUS PROVISIONS OF THE OHIO PARK BOARD LAW IS UNAVAILING, BECAUSE

(a) Questions pertaining to the enforcement of the constitutional guaranty of a republican form of Government are of a political character, and as such are beyond the jurisdiction of this court.

(b) No substantial Federal question is raised with reference to alleged delegation of legislative power to the Probate Judge of a county, or to non-elected park commissioners, since the constitutionality under the Federal Constitution of similar provisions in the Conservancy Act of Ohio has been established by the decisions of the Supreme Court of the United States.

(c) No substantial Federal question is presented by appellant's contention, that by the provisions of the Ohio Park Board law the taxpayers of the district are burdened unequally.

(a)

Questions pertaining to the enforcement of the constitutional guaranty of a republican form of Government are of a political character, and as such are beyond the jurisdiction of this court.

What has hereinbefore been said under Section (b) of Point I of this brief applies here.

(b)

No substantial question is raised with reference to alleged delegation of legislative power to the Probate Judge of a county, or to non-elected park commissioners, since the constitutionality under the Federal Constitution of similar provisions in the Conservancy Act of Ohio has been established by the decisions of the Supreme Court of the United States.

Appellant's brief (pages 26 and 27) enumerates various provisions of the Ohio Park Board Law alleged to be repugnant to the due process and equal protection clauses, and to the guaranty of a republican form of government, contained in the Federal Constitution. It is impossible from a perusal of said brief to determine which of said provisions of the Ohio Park Board Law are claimed to be repugnant to the due process clause; which provisions are claimed to be repugnant to the equal protection clause, and which are claimed to be repugnant to Article 4, Section 4 guaranteeing a republican form of government to every state.

If, as contended above, there is no merit in appellant's contentions relative to denial of a republican form of government, there remains to be considered only the question of alleged repugnancy to the due process and equal protection clauses of Section 1 of the 14th Amendment.

The enumeration of points above referred to appearing at pages 26 and 27 of appellant's brief complains of four provisions of the Ohio Park Board Law as being an unconstitutional delegation of legislative power to the probate judge of a county; and further complains of six provisions of the Ohio Park Board Law as being an unconstitutional delegation of legislative power to non-elected park commissioners.

Following the great Dayton Flood, there was enacted in 1914 by the Legislature of Ohio the so-called Conservancy Act of Ohio, (Sections 6828-1 to 6828-79 inclusive) the constitutionality of which under the Federal Constitution has been upheld by this Court. Since there will be found in the Conservancy Act of Ohio provisions similar to every one of the aforementioned ten Ohio Park Board Law Provisions of which appellant complains, we parallel below such provisions of both acts. (Italics ours)

(Note: See appellant's brief pages 26 and 27, 2a and 2b for list of these points)

COMPARISON OF PROVISIONS IN OHIO PARK BOARD LAW AND CONSERVANCY ACT OF OHIO.

OHIO PARK BOARD LAW	CONSERVANCY ACT OF OHIO
A. DUTIES TO BE PERFORMED BY JUDGE.	
Section 2976-2.	Section 6828-3.
"Application for the creation of such park districts shall be made to the probate judge of the county within which the district is to be located. Such application shall either be signed by a majority of the resident electors residing within the proposed district as determined by the number of electors voting at the last preceding general election within such territory, or, in lieu thereof, shall be authorized by resolution adopted by any board of township trustees or city council, or other legislative body, of any township, village or city, within such proposed district."	"Before any court shall establish a district as outlined in (G. C. 6828-2), a petition shall be filed in the office of the clerk of said court, signed either by five hundred freeholders, or by a majority of the freeholders, or by the owners of more than half of the property, in either acreage or value, within the limits of the territory proposed to be organized into a district. Such a petition may be signed by the governing body of any public corporation lying wholly or partly within the proposed district, in such manner as it may prescribe, and when so signed by such governing body such a petition on the part of the said governing body shall fill all the requirements of representation upon such petition of the freeholders of such public corporation, as they appear upon the tax duplicate; and thereafter it shall not be necessary for individuals within said public corporation to sign such a petition. Such a petition may also be signed by railroads and other corporations owning lands. And such petition may also be filed by any city or cities interested in some degree in the improvement, upon proper action by their governing bodies."

(a)

Section 2976-4.

"At such hearing evidence may be taken as in other civil cases in said court, and the judge shall hear all arguments for and against the creation of such district. If he shall find that such application is signed, or authorized, as herein provided, and that the creation of such district will be *conducive to the general welfare*, he shall enter an order creating the district under the name specified in the application." * * *

(b)

Section 2976-4.

"* * * The probate judge shall have the power to amend or change the limits of the territory described in the petition at the time of the hearing upon the same, provided, that in no case shall he increase the limits or size of said district, and provided further, that in case any of the original territory be eliminated from the district as finally established, that the boundary lines of the district as finally ordered by the court shall not divide any existing township or municipality."

Section 6828-2.

"The court of common pleas of any county in this state, or any judge thereof in vacation, is hereby vested with jurisdiction, power and authority, *when the conditions stated in the third section of this act are found to exist*, to establish conservancy districts, * * *."

Section 6828-3.

"* * * Second: The necessity for the proposed work and that it will be *conducive to the public health, safety, convenience or welfare.*"

Section 6828-59.

"Lands may be included in more than one district.—The same land, if *conducive to public health, safety, convenience or welfare*, may be included in more than one district and be subject to the provisions of this act for each and every district in which it may be included, provided, that no district shall be organized under this act in whole or in part within the territory of a district already organized under this act until the court or courts determine whether the public health, safety, convenience or welfare demand the organization of an additional district, or whether it demand that the territory proposed to be organized into an additional district shall be added to the existing district; and in case the proceedings concerning two or more such districts are before the court of common pleas of two or more counties, such determination shall be as provided in the next section."

Section 6828-60.

"* * * At such conference, the several judges shall determine to what extent the several districts should be consolidated or to what extent the boundaries should be adjusted in order to most fully carry out the purposes of this act; and they shall by suitable orders make such determination effective."

Section 6828-28.

"Lands affected outside of district.—If the appraisers find that lands or other property not embraced within the boundaries of the district will be affected by the proposed improvement, or should be included in

the district, they shall appraise the benefits and damages to such land, and shall file notice, in the court, of the appraisal which they have made upon the lands beyond the boundaries of the district, and to the land which in their opinion should be included in the district. The appraisers shall also report to the court any lands which in their opinion should be eliminated from the district."

Section 6828-29.

"Notice of hearing on land excluded from or taken into district.—If the report of the board of appraisers includes recommendations that other lands be included in the district, or that certain lands be excluded from the district, it shall be the duty of the clerk of the court before which the proceeding is pending to give notice to the owners of such property by publication to be made as provided in this act for a hearing on the petition for the creation of the district. Such notice to those owners whose lands are to be added to the district may be substantially as shown in the schedule herein. The time and place of the hearing may be the same as those of hearings on appraisals. To the owners of property to be excluded from the district it will be sufficient to notify them of that fact."

(c)

Section 2976-5.

"Upon the creation of such district the probate judge shall appoint three commissioners, who shall take office immediately and whose respective terms, shall expire one, two and three years, respectively, from the first day of January next after the date of their appointment, and thereafter their successors shall be appointed by such probate judge for terms of three years."

Section 6828-8.

"Within thirty days after entering the decree incorporating said district, the court shall appoint three persons, at least two of whom shall be resident freeholders within the district, as a board of directors of the district—one for a term of three years, one for a term of five years, and one for a term of seven years. At the expiration of their terms of office appointment shall be made for terms of five years. The court shall fill all vacancies which may occur on the said board."

(d)

Section 2976-10d.

"When conducive to the general welfare any territory adjacent and contiguous to an existing park district, whether located within or without the county in which such district was created, may be annexed to such park district as follows: Upon the

Section 6828-28.

"If the appraisers find that lands or other property not embraced within the boundaries of the district will be affected by the proposed improvement, or should be included in the district, they shall appraise the benefits and damages to such land, and shall

filing with the board of park commissioners of a petition requesting such annexation, containing an accurate description of the territory proposed to be annexed, accompanied by an accurate map or plat of such territory, and signed either by a majority of the electors residing within such territory or by not less than fifty such electors, the board of park commissioners shall determine whether they deem it advisable that such annexation should be made. If they determine in favor of such annexation, they shall make application to the probate court of the county in which such territory is located, setting forth the fact of the filing of such petition and the reasons why it is advisable that such territory should be annexed to such park district. Any such board may of its motion file such petition in such probate court. Upon the filing of such petition, like proceedings shall be had as are provided in sections 2976-3 and 2976-4 of the General Code upon application for the creation of a park district, except that the territory so annexed may include a part only of an existing township or municipality."

file notice, in the court, of the appraisal which they have made upon the lands beyond the boundaries of the district, and to the land which in their opinion should be included in the district. The appraisers shall also report to the court any lands which in their opinion should be eliminated from the district."

Section 6828-29.

"If the report of the board of appraisers includes recommendations that other lands be included in the district, or that certain lands be excluded from the district, it shall be the duty of the clerk of the court before which the proceeding is pending to give notice to the owners of such property by publication to be made as provided in this act for a hearing on the petition for the creation of the district. Such notice to those owners whose lands are to be added to the district may be substantially as shown in the schedule herein. The time and place of the hearing may be the same as those of hearings on apraisals. To the owners of property to be excluded from the district it will be sufficient to notify them of that fact."

B. Duties to be Performed by Commissioners.

(a)

Section 2976-10g.

"The board of park commissioners shall have power to adopt such by-laws, rules and regulations as they may deem advisable for the preservation of good order within and adjacent to such parks and reservations of land, and for the protection and preservation of the parks, parkways and other reservations of land under their jurisdiction and control, and of property and natural life therein, and such by-laws, rules and regulations shall be published as provided in case of ordinances of municipal corporations before taking effect. Whoever violates any such by-laws, rules or regulations shall be deemed guilty of a misdemeanor * * *."

Section 6828-19.

"* * * the board of directors may make regulations for and may prescribe the manner of building bridges, roads or fences or other works in, into, along or across any channel, reservoir or other construction; * * *"

"* * * The construction of any works in a manner harmful to the district or to any water course therein, and in a manner contrary to that specified by the directors, shall be a misdemeanor, * * *"

Section 6828-65.

"Right to police district.—The board of directors shall have the right to *police* the works of the district, and in times of great emergency may compel assistance in the protection of such works, and shall, also, have the right to prevent persons, vehicles or live stock from passing over the works of the district in any manner which would result in damage thereto."

(b)

Section 2976-10.

"Such a board shall have power to levy taxes upon all the taxable property within such district in an amount not in excess of one-tenth of one mill upon each dollar of the assessed value of the property in the district in any one year, subject, however, to the combined maximum levy for all purposes otherwise provided by law."

Section 6828-43.

"As soon as any district shall have been organized under this act, and a board of directors shall have been appointed and qualified, such board of directors shall have the power and authority to levy upon the property of the district not to exceed three-tenths of a mill on the assessed valuation thereof as a level rate to be used for the purpose of paying expenses of organization, for surveys and plans, and for other incidental expenses which may be necessary up to the time money is received from the sale of bonds or otherwise. This tax shall be certified to the auditors of the various counties and by them to the respective treasurers of their counties. * * *"

(c)

Section 2976-7.

"Such board shall have power to acquire lands either within or without such district for conversion into forest reserves and for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands, and to those ends may create parks, parkways, forest reservations and other reservations and afforest, develop, improve and protect the same in such manner as they may deem conducive to the general welfare." * * * "Such lands may be acquired by such board, on behalf of said district, by gift or devise, by purchase, or by appropriation."

Section 6828-15.

"In order to effect the protection, reclamation or irrigation of the land and other property in the district, and to accomplish all other purposes of the district, the board of directors is authorized and empowered * * * to hold, encumber, control, to acquire by donation, purchase or condemnation to construct, own, lease, use and sell real and personal property, and any easement, riparian right, railroad right of way, canal, cemetery, sluice, reservoir, holding basin, mill dam, water power, wharf, or franchise in or out of said district. * * *"

Section 6828-18.

"Said board shall also have the right to condemn for the use of the district, any land or property within or without said district. * * *"

(d)

Section 2976-7.

"Such board shall have power to acquire lands either within or without such district for conversion into forest reserves and for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands, and to those ends may create parks, parkways, forest reserva-

Section 6828-18.

"Said board shall also have the right to condemn for the use of the district, any land or property within or without said district. * * *"

tions and other reservations and afforest, develop, improve and protect the same in such manner as they may deem conducive to the general welfare. Such lands may be acquired by such board, on behalf of said district, by gift or devise, by purchase, or by appropriation."

(e)

Section 2976-10.

"Such board shall have power to levy taxes upon all the taxable property within such district in an amount not in excess of one-tenth of one mill upon each dollar of the assessed value of the property in the district in any one year, subject, however, to the combined maximum levy for all purposes otherwise provided by law. * * *"

Section 2976-7.

"Such board shall have power to acquire lands either within or without such district for conversion into forest reserves and for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands, and to those ends may create parks, parkways, forest reservations and other reservations and afforest, develop, improve and protect the same in such manner as they may deem conducive to the general welfare. Such lands may be acquired by such board, on behalf of said district, by gift or devise, by purchase, or by appropriation."

Section 6828-43.

"As soon as any district shall have been organized under this act, and a board of directors shall have been appointed and qualified, such board of directors shall have the power and authority to levy upon the property of the district not to exceed three-tenths of a mill on the assessed valuation thereof as a level rate to be used for the purpose of paying expenses of organization, for surveys and plans, and for other incidental expenses which may be necessary up to the time money is received from the sale of bonds or otherwise. This tax shall be certified to the auditors of the various counties and by them to the respective treasurers of their counties. * * *"

Section 6828-15.

"In order to effect the protection, reclamation or irrigation of the land and other property in the district, and to accomplish all other purposes of the district, the board of directors is authorized and empowered, * * * to hold, encumber, control, to acquire by donation, purchase or condemnation, to construct, own, lease, use and sell real and personal property, and any easement, riparian right, railroad right of way, canal, cemetery, sluice, reservoir, holding basin, mill dam, water power, wharf, or franchise in or out of said district. * * *"

(f)

Section 2976-7.

"Such board shall have power to acquire lands either within or without such district for conversion into forest reserves and for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands, and to those ends may create parks, parkways, forest reservations and other reservations and afforest, develop, improve and protect the same in such manner as they may deem conducive to the general welfare."

Section 6828-24.

"* * * All the rights and property of the district in the waters and water courses of the district, and in their uses, shall be exercised in such manner as to promote the welfare of the district * * *."

From the above, we submit, it will be found that each provision in the Ohio Park Board Law complained of in appellant's brief as being an unconstitutional delegation of legislative power to the probate judge or to the park commissioners, has its parallel in a similar provision in the Conservancy Act of Ohio. We now proceed to refer to the sweeping decisions whereby the courts have upheld the Conservancy Act of Ohio in every detail.

By singular and significant coincidence, appellant makes no reference whatever in his brief to the case of *Orr v. Allen, et al.*, 248 U. S. 35, wherein this Court upheld the constitutionality under both state and federal constitutions, of the Conservancy Act of Ohio which like the Ohio Park Board Law, was enacted pursuant to the provisions of Article 36, Section 2 of the Constitution of the State of Ohio.

Practically all of the constitutional questions at issue as to the Ohio Park Board Law were in issue in the litigation relating to the Conservancy Act of Ohio and the decision of the Supreme Court of the United States in *Orr v. Allen, et al., supra,* in upholding the constitutionality of the Conservancy Act establishes the constitutionality of similar provisions of the Ohio Park Board Law.

The memorandum opinion by the Chief Justice in *Orr v. Allen, et al., supra,* is as follows (italics ours except as to cases cited):

> "The 'Conservancy Act of Ohio' is the name given the statute by its first section. Its seventy-nine sections are thus epitomized in the title: 'To prevent floods, to protect cities, villages, farms and highways from inundation, and to authorize the organization of drainage and conservation districts.' Ohio Gen. Code, §§6828-1 to 6828-79; Laws of Ohio, vol. 104, p. 13. The statute was admittedly designed to prevent the recurrence of the unprecedented and disastrous flood which invaded the Miami Valley in 1913. Briefly, there was

provision for drainage districts, for boards to plan, construct and maintain the works contemplated, with the right to exert eminent domain, and to raise money by taxation, by assessments for benefits, and, in some cases, by issue of bonds. Every person affected who was aggrieved was undoubtedly given ample means by the statute to test judicially his grievance.

"A district was organized embracing land along each side of the Miami River which had been flooded in 1913 or which was required for reservoir sites or for furnishing material.

"The appellant, a citizen of California owning property within this district, filed his bill to enjoin the enforcement of the statute on the ground that it was repugnant to both the constitution of the State and that of the United States. The court, organized under §266 of the Judicial Code, *in a careful and clear opinion* disposed adversely of every proposition upon which the contention was based. The injunction was refused. This direct appeal was taken.

"All the contentions rest upon one or the other or both of two propositions; (1) That the statute is unconstitutional because of some particular provision relied upon; and (2) because of the inherent want of constitutional authority by Government to exert the powers which the statute gave. The first assumes that the statute has a significance which the Supreme Court of Ohio has expressly decided it has not, and, in addition, that the constitution of the State forbids the exertion of a legislative power which the same court has expressly held the legislature possessed. The second disregards a line of conclusive decisions of this court which leave nothing open for controversy, or, which is tantamount thereto, separates expressions in opinions of this court from their context in order to give to them a meaning which the opinions do not sanction and which it has been repeatedly declared would be inconsistent with the decided cases.

"Thus concluding, we think nothing is required to dispose of the controversy but to cite the two lines

of cases referred to. (1) *Snyder v. Deeds,* 91 Ohio St. 407; *Miami County v. Dayton,* 92 Ohio St. 215; *County Commissioners v. Gates,* 83 Ohio St. 19, 34; *State ex rel. Franklin County Conservancy District v. Valentine,* 94 Ohio St. 440; (2) *Houck v. Little River Drainage District,* 239 U. S. 254, 262, and cases cited."

The syllabus in said case recapitulates the decision in the following words (italics ours):

> "The 'Conservancy Act of Ohio,' designed to prevent floods, and authorizing creation of drainage districts, and drainage improvements through administrative boards empowered to exert eminent domain, and to tax, assess for benefits, and issue bonds, affords full opportunity for testing private grievances judicially, and, *as correctly construed by the court below,* is consistent with the state and federal constitutions. 245 Fed. Rep. 486, affirmed."

The conservancy provision of the Ohio Constitution was adopted on September 3, 1912, and the Dayton flood did not occur until March 1913. Judge Wanamaker says in *County of Miami, et al. v. City of Dayton, et al.,* 92 O. S. 215, 224:

> "This amendment was adopted September 3, 1912, and reads almost like a prophecy of Jeremiah as to the terrible floods that visited different portions of the State in March of the following year."

The decision of the U. S. district court (*Orr v. Allen, et al.,* 245 Fed. 486) which was incorporated by reference into the Supreme Court opinion holds that the due process and equal protection requirements of the Constitution are satisfied for the following reasons:

> 1st. Because a state has power to require local improvements to be made which are essential to the health, comfort, safety and prosperity of the community.
>
> 2nd. Because a public use resulted from the Act which justified the exercise of the power of eminent domain and the levy of taxes.

3rd. Because the costs of the improvement were apportioned within the taxing district in a just and reasonable mode according to benefits.

4th. Because it provides notice to the landowners and a hearing upon every essential question of fact involving the creation of the district and the rights of taxpayers.

5th. Because a levy of an ad valorem tax upon the property in the conservancy district for the purpose of paying preliminary expenses does not violate the 14th Amendment to the Federal Constitution.

6th. Because the decision of the Ohio Supreme Court in *Miami County v. Dayton*, 92 O. S. 215, sustained the Act in an opinion, which though not controlling, was said by the Court to be entitled to great weight.

The decision in *County of Miami, et al. v. City of Dayton, et al.*, just referred to, was also cited with approval in the Supreme Court opinion in *Orr v. Allen, supra.* The opinion of the case, after setting forth principles similar to those adopted by the Federal Court decision in *Orr v. Allen*, makes the further statement that to delegate the power to the Common Pleas Court to organize the district is not unconstitutional. The syllabus of the court on this point reads as follows:

"Where a power is quasi-legislative, quasi-administrative, or quasi-judicial, or so mixed in its nature that it may be regarded as a combination of all of them, the Legislature may in the first instance characterize such power and confer it either upon an existing agency of the government or an agency especially created for that purpose. There is no delegation of legislative power in the Conservancy Act violative of any constitutional provision."

The constitutionality under the Federal Constitution of the Conservancy Act of Ohio was also considered in

Silvey, et al. v. Commissioners of Montgomery County, Ohio, et al., 273 Fed. 202. The court says at page 204:

> "The act in question is charged to be obnoxious in 6 different respects to the Constitution of the United States and to some 37 provisions of the Constitution of Ohio. Most of the objections urged are unimportant and even frivolous. Only those will be considered which are deemed worthy of notice.
>
> "The bill charges that the act deprives the plaintiff and other similarly situated property owners of their property without due process of law and denies them the equal protection of the law. The fallacy of this claim has been conclusively settled by *Miami County v. Dayton*, 92 O. S. 215, 110 N. E. 726; *Orr v. Allen*, (D. C.) 245 Fed. 486 (a three-judge case), and *Orr v. Allen*, 248 U. S. 35, 39 Sup. Ct. 23, 63 L. Ed. 109. See also, *O'Neill v. Leamer*, 239 U. S. at page 253, 36 Sup. Ct. 54, 60 L. Ed. 249.
>
> "The averment is made that the Conservancy Act, by providing for the organization and membership of the common pleas court in a district embracing territory within more than one county, and by conferring jurisdiction and authority on such court to establish conservancy districts, delegates legislative power to such court, and thereby violates both the state and the federal Constitution. This contention was decided adversely to plaintiff in *Snyder v. Deeds*, 91 Ohio St. 407, 110 N. E. 1068, and *Miami County v. Dayton*, 92 Ohio St. 215, 234, 235, 110 N. E. 726. Drainage or conservancy districts may, like school districts, be established by legislative sanction. The power conferred on the court of common pleas is not unlike that delegated to township trustees, county commissioners, and other bodies, authorizing them to organize districts for the construction of public improvements and for taxing or assessing the lands benefited thereby. Such enactments have almost uniformly been held to be a delegation of legislative power, not prohibited by the organic law. The propriety of delegating authority to a local court to frame a conservancy district is, in any event,

a state question. *O'Neill v. Leamer*, 239 U. S. at pages 247, 248, 253, 36 Sup. Ct. 54, 60 L. Ed. 249."

Again at page 206 the Court says:

"The Fourteenth Amendment to the Federal Constitution does not deprive the state of the power of determining whether the officers of the conservancy district shall be appointed or be elected by the people, or the duties to be performed by them; nor does it invalidate a tax levy or an assessment lawfully made by such officers for a duly authorized improvement, or deprive the district as a political subdivision of the power to levy and collect taxes or assessments to pay the amount charged against property or political subdivisions, such as municipalities, counties, or townships, within such district. *Soliah v. Heskin*, 222 U. S. 522, 32 Sup. Ct. 103, 56 L. Ed. 294."

"Without entering upon a further detailed consideration of the case, it may be said that every substantial objection now urged against the Conservancy Act and depending upon the federal or state Constitution or laws has been decided adversely to the plaintiff, as will appear from *Miami County v. Dayton*, 92 Ohio St. 215, 110 N. E. 726; *Snyder v. Deeds*, 91 Ohio St. 407, 110 N. E. 1068; *Orr v. Allen* (D. C.) 245 Fed. 486, affirmed 248 U. S. 35, 39 Sup. Ct. 23, 63 L. Ed. 109; *Koehne v. City of Dayton*, 97 Ohio St. 341, 119 N. E. 651, and from the unreported cases of *County of Miami v. Deeds*, No. 15,347, *Koehne v. Miami Conservancy District*, No. 15,779, *Blevins v. Miami Conservancy District*, No. 15,965, *Hawthorne v. City of Troy*, No. 16,653, and *State ex rel. Silvey and Blevins v. Miami Conservancy District*, No. 16,699, 130 N. E. 943, all decided by the Supreme Court of Ohio. Rarely has a law been found which has been assailed with such frequency or from so many angles. It has withstood every test. The Ohio courts for some time past, as evidenced by many cases, have treated its constitutionality as settled beyond controversy, * * *"

The following paragraphs from the syllabus recapitulate the court's decision on these constitutional points:

> "The Conservancy Law of Ohio does not, as to a taxpayer of the city of Dayton, work a deprivation of property without due process of law, or deny equal protection of the law."
>
> "The Ohio Conservancy Law, by providing for the organization and membership of the common pleas court in a district embracing territory within more than one county, and conferring jurisdiction and authority on such court to establish conservancy districts, is not invalid under the state and federal constitutions as unlawfully delegating legislative power to such court."
>
> "The propriety of delegating authority to a local court to frame a conservancy district is a state question."
>
> "Const. U. S. Amend. 14, does not deprive the state of Ohio of the power of determining whether officers of the conservancy district shall be appointed or elected by the people, or prescribing the duties to be performed, nor does such amendment invalidate a tax levy, or an assessment lawfully made by such officers for a duly authorized improvement."

The case of *Soliah v. Heskin, et al.*, 222 U. S. 522, at page 524, cites with approval *Prentis, et al. v. Atlantic Coast Line Company*, 211 U. S. 210, which holds that so far as the Federal Constitution is concerned a State may, by constitutional provision, unite legislative and judicial powers in the same body.

Thus, it is seen the courts have established the constitutionality under the Federal Constitution of provisions similar to those contained in the Ohio Park Board Law and the omission in appellant's brief of mention of the line of cases by which such constitutionality is established is significant.

From a comparison of the provisions of the Conservancy Act of Ohio and the Ohio Park Board law, and from a consideration of the aforementioned decisions relating to the Conservancy Act of Ohio, it is clear, we submit, that no substantial contention has been raised by appellant with reference to alleged delegation of legislative power to the probate judge, or to non elected park commissioners.

Each of the ten provisions of the Park Board Law, challenged by appellant's brief, finds its counterpart in a similar provision in the Conservancy Act.

1. The provisions of G. C. 2976-4 of The Park Board Law relative to finding that creation of district will be conducive to the general welfare, similarly appear in G. C. 6828-2 and 6823 of the Conservancy Act.

Appellant's reference to the petitioners as "self constituted" conveys an impression which is not substantiated by an analysis of The Park Board Law. G. C. 2976-2 prescribes very definite qualifications for petitioners. They must reside in the proposed district, and must constitute a majority of the electors residing therein; or in lieu of the signatures on the application, the petition may be "authorized by resolution adopted by any board of township trustees or city council, or other legislative body, of any township, village or city, within such proposed district." While the initiative must come from the electors or the legislative bodies of the governmental subdivisions in the proposed district, the applicants are no more "self constituted" than those who sign a petition under the initiative and referendum provisions of a State constitution, or in the nomination of a candidate for public office.

2. G. C. 2976-4, relative to changing the limits of the proposed district is similar to G. C. 6828-60 of the Conservancy Act.

Appellant's statement that the probate judge is given power to "mold" the boundaries of the district overstates the provision of the statute. The judge may only reduce the size of the district as provided by the Park Board Law. Appellant cites no instance where the judge has availed himself of even this limited power, nor so far as we are informed, has there ever been such an instance.

3. G. C. 2976-5 relating to appointment of park commissioners corresponds to G. C. 6828-8 of The Conservancy Act. The only distinction between the Conservancy Act requirements and the Park Board law requirements is that the former provides that two of the three board members shall be resident freeholders of the district, while the latter provides for no such qualification. No authority is cited to show that this is contrary to the Federal Constitution, and no basic reason is advanced for the contention.

4. G. C. 2976-10d, relative to expansion of district, when found to be "conducive to the general welfare" is not different in principle from G. C. 6828-28. The contention is essentially the same as appellant's first contention, referred to above.

5. G. C. 2976-10g relative to misdemeanors and police powers is in effect the same as G. C. 6829-19 and 6828-65 of The Conservancy Act wherein similar powers are given to appointive directors.

In *Soliah vs. Heskin, et al., supra,* the Supreme Court of the United States has decided that the 14th Amendment does not deprive a state of the power to determine what duties may be performed by local officers, nor whether they shall be appointed or elected by the people.

6. G. C. 2976-10 of The Park Board Law and G. C. 6828-43 of the Conservancy Act of Ohio, alike confer upon appointive officials the tax levying power.

Under The Conservancy Act, certain of the levies may be "upon the property of the district"; while others are to be "on all real property, upon which benefits have been appraised." In the litigation relating to the Conservancy Act (*Orr vs. Allen, et al.*, 245 Fed. 486; *County of Miami, et al., vs. City of Dayton*, 92 O. S. 215), the court held certain ad valorem levies on real estate only, to be in the nature of general assessments, because under the uniform rule of taxation in the Ohio Constitution, an ad valorem general tax would have had to be upon real and personal property alike. The decisions in such litigation therefore met the exigencies of the situation so far as the uniform rule of taxation then in effect in Ohio was concerned, but there is nothing in the decisions growing out of such litigation intimating that the question as to whether the 14th Amendment to the Federal Constitution was violated depended upon whether the levies were held to be in the nature of general taxes or in the nature of special assessments.

If the Federal Constitution permits the Legislature to authorize the levying of special assessments by the appointive board, it does not stay the hand of the Legislature in the matter of general taxes.

All taxation general or special is an exercise of the same sovereign power, namely, the power of taxation, and there is no basis for the claim that the one, any more than the other, violates the Fourteenth Amendment.

7. G. C. 2976-7 of The Park Board Law and G. C. 6828-18 of the Conservancy Act alike confer the power upon appointive officials to acquire land without, as well as within, the district.

Concerning the acquisition of lands *without* the district, the like power is of course generally conferred upon the different political sub-divisions, and the rights of the taxpayers are not prejudiced by the fact of the outside

acquisition, *unless* it affirmatively appears that there is an abuse of discretion. The Cleveland Airport is an illustration of the fact that suitable areas or facilities may not be available within the sub-division limits.

The virtual necessity of going beyond the subdivision limits in some cases is illustrated by the fact that the water supply of New York City and of many other cities is procured from many miles beyond the city limits. A municipality has ample authority to provide recreation areas for its inhabitants, and yet proper recreation areas may be entirely lacking within the municipal limits. There would seem to be no more basis for the proposition that a city or park district must keep within its territorial limits in acquiring land, than there would be for the proposition that it could not purchase supplies from a source beyond its boundaries.

8. The power of eminent domain is conferred upon park commissioners by G. C. 2976-7, and also upon conservancy directors by G. C. 6828-18.

9. As appears in G. C. 2976-10, and G. C. 6828-43 and 6828-15, the directors under the Conservancy Act have power to acquire lands without the district and visit the cost upon taxpayers within it to the same extent as in The Ohio Park Board Law.

10. Appellant complains that the Ohio Park Board law is repugnant to the Federal Constitution in delegating to non-elected park commissioners the legislative power to expend tax revenues for acquiring lands at discretion, and for so developing, improving and protecting them "as they may deem conducive to the general welfare."

An examination of G. C. 2976-7 shows that no unlimited discretion is given to the commissioners, but that the very sentence containing the language appellant complains of, enumerates the things which the commissioners are au-

thorized to do, and merely states that the things specified must be done "in such manner as they may deem conducive to the general welfare." The Board is empowered to acquire lands; to create parks, parkways, and other reservations; to develop, improve and protect the same; and the Act merely provides that they must do these things in such manner as they may deem conducive to the general welfare.

The Conservancy Act of Ohio contains language similar. G. C. 6828-24 enumerates certain specific things which the directors are authorized to do, and then provides that the powers therein given "shall be exercised in such manner as to promote the welfare of the district."

The power given to the Park Board Commissioners is not unlike that given to the Secretary of Agriculture by the Acts of Congress considered by the Supreme Court of the United States in the case of *U. S. v. Grimaud,* 220 U. S. 506, wherein he was authorized to:

> " * * * make such rules and regulations and establish such service as will insure the objects of such reservation * * *."

The regulations under consideration in that case having been prescribed by the Secretary of Agriculture, an *appointive* and *executive* or *administrative official* and the violation of such regulations having the force and effect of misdemeanors and being punishable by fine, the case is a direct negation of the claim that like power conferred on the Park Board is an unauthorized delegation of legislative power.

In the Ohio Park Board law the things which the board may do "as they deem conducive to the general welfare" are not less related to the objects specifically set forth in the Act than were the powers given to the Secretary of Agriculture by the Act of Congress above referred to,

which the Supreme Court of the United States held not to be an unconstitutional delegation of legislative authority.

Generally as to the delegation of power, legislative, judicial or administrative, the court uses the following language in *Miami County v. Dayton,* 92 O. S. 215 at page 234:

> "It is difficult to see how this is any more a delegation of legislative power than the appointment of receivers and the various orders of court authorizing them to continue a going concern or to sell the same and distribute the proceeds, or to appoint appraisers in any given case, or any of the numerous boards that have heretofore been appointed by courts for the purpose of carrying out the substantial provisions of various statutory proceedings. But suppose that the powers so conferred are quasi-legislative, it must be conceded they are also quasi-administrative and quasi-judicial, and in such cases where the twilight zone of distinction prevails it has always been regarded as the right and duty of the legislature to determine the nature of the function exercised and the body that should exercise it."

By analogy to provisions in the Conservancy Act of Ohio, the constitutionality of which under both State and Federal State constitutions has been sustained, all of the contentions of the appellant relating to the delegation of power to probate judges and non-elected park commissioners are forever set at rest, and the constitutionality of the Ohio Park Board law in the particulars complained of by appellant is established.

We feel that the present case is one that calls for the strict application of the rule of *stare decisis* in regard to these statutes and requires that such recognition preclude a reconsideration of the issues.

If, for any reason, the rule thus contended for is not to be applied so as to properly preclude an argument upon

the illegality of the statutes, we then urge the same reasons and adopt the same arguments as will be found in the cases which in our opinion impel a decision in favor of the appellees, viz.: *Orr v. Allen, et al.*, 248 U. S. 435; *Orr v. Allen, et al.*, 245 Fed. 486; *Sylvey, et al. v. Commissioners of Montgomery County, Ohio, et al.*, 273 Fed. 202; and *Miami County, et al. v. Dayton*, 92 O. S. 215.

(c)

No substantial Federal question is presented by appellant's contention, that by the provisions of the Ohio Park Board Law the taxpayers of the district are burdened unequally in different ways.

In the enumeration of points appearing at pages 26 and 27 in appellant's brief, sub-section (C) reads as follows:

"(C) in burdening taxpayers of the district unequally in sundry ways."

There appears no tabulation of the points relied upon by appellant under this heading. From an examination of the record and of appellant's brief, the following appear to be the "sundry ways" to which appellant's contention may relate, although not justified upon the record facts:

(1) By permitting the board to acquire a large part of the land in any existing township, school district, or other taxing sub-division, the land acquired thereby becoming exempt from taxation so as to overburden the residue.

(2) By permitting the budget commissioners of different counties into which a park district extends to reduce in varying degrees the rate of its unvoted tax levy.

(3) By casting upon taxpayers within the park district the entire burden of cost of a state improvement not undertaken for the special benefit of the territory included in such district.

Considering these "sundry ways" in order, we respectfully submit:

(1) There is no repugnancy to the Federal Constitution in permitting the board to acquire a large part of the land in any existing township, school district, or other taxing subdivision; the land acquired thereby becoming exempt from taxation so as to over-burden the residue.

No case is cited by appellant in support of his contention nor does the record disclose facts which indicate that "a large part of the land in any existing township, school district or other taxing subdivision," has actually been acquired. Wherever property is acquired for a public purpose, both within or without a taxing district, it becomes exempt from taxation.

As a matter of fact, in the acquiring of park lands, and conserving natural resources by adding swamp lands, forest lands, etc., to the park domain, the property acquired is apt to be to a considerable extent unimproved and therefore less valuable for taxing purposes than improved property. We believe it may be fairly assumed that the taking over of such lands by the Park Board would result in a reduction in governmental expenses to an extent not unrelated to the proportional value of the lands taken as compared with the total tax duplicate of the township or village within which the lands are located.

This Court has often held that there is nothing in the Federal Constitution to prevent the state from granting exemption from taxation.

N. Y. ex rel. Metropolitan Street Railway Company v. Tax Commissioners, 199 U. S. 1;

Bell's Gap Railway Company v. Pennsylvania, 134 U. S. 232.

It has likewise been held that the State has broad discretion in the matter of creating exemptions.

Rogers v. Hennepin County, 240 U. S. 184.

At this time nothing but a moot question is presented. Obviously any church or school, as well as a park district, might acquire a whole or a substantial part of a township, but no such situation has yet occurred.

The burden does not become different in kind, but only in degree when the acquisitions are large instead of small. The objection is therefore in effect directly against the principle of *tax exemption* because the burden complained of obtains whenever there is any exemption and regardless of its extent or purpose—whether acquired for public, charitable or religious purposes.

(2) There is no repugnancy to the Federal Constitution in permitting the budget commissioners of different counties into which a park district extends to reduce in varying degrees the rate of its unvoted tax levy.

This contention is set forth at page 9 in appellant's brief, and is presumably one of the things referred to in Item "C" set forth at page 27 of said brief where it is contended that the Ohio Park Board law is repugnant to the Federal Constitution "in burdening the tax payers of the district unequally in sundry ways."

Section 10 of the Park Board Act gives to the Board the power to levy annually not to exceed 1/10th of 1 mill, subject however, to the "combined maximum levy for all purposes otherwise provided by law."

Appellant's point is that where the district is located in more than one county the budget commission of each of the counties has control over the levy as to that portion of the park district within such county; that the budget commissioners of the two counties might not act uniformly and the result would be that there would be different rates

of taxation for park purposes in different portions of the same park district.

The complete answer to the objection is found in General Code Section 5626 which is as follows:

> "5626. Joint session of budget commission; adjustment of tax rate.—
>
> Whenever a taxing district is located in two or more counties, the budget commission of the counties in which such district is located shall meet in joint session at the call of the chairman of the commission of the county wherein the greatest amount in value of taxable property in such taxing district is located, and adjust the rates of taxation for the purpose of such district so as to enforce the limitations on the tax rate prescribed by law and to produce uniform rates throughout the districts. Provided, however, that the levies for such taxing district purposes shall not be reduced by such joint budget commission below what would be required to enforce such limitation in such part of such district in which the least reduction of such levies is necessary to enforce such limitation; and such levies so fixed shall be applied uniformly throughout the district. (112 v. 423, §1 (former §5626 repealed, 112 v. 409, §40); R. S. §2821, Eff. Aug. 17, 1927.)"

Under this section it will be seen that park board levies are applied uniformly throughout the entire district. Nothing appears in the record to show the contrary.

(3) Appellant contends that the Ohio Park Board law casts upon taxpayers within the park district the entire burden of cost of a state improvement not undertaken for the special benefit of the territory included in such district; and that in this respect said law is repugnant to the Federal Constitution.

The Ohio Park Board Law was enacted by the Legislature of the State in the exercise of its police powers and

its constitutionality must be tested with reference thereto. The police powers of the state were not restricted by the conservation amendment of 1921 in Section 36 of Article 2 of the Ohio Constitution. The purpose of that amendment was to support and add to the broad powers which the Legislature had. In the Ohio Park Board Law there appears an exercise of the general police power for the advancement of the common welfare of a community combined with the exercise of the specific power conceived in the conservancy amendment.

The contention of the appellant that the result of the Ohio Park Board Law is to cast upon a particular district the burden of an improvement state-wide in its purpose is therefore, if not founded on a false premise, at least founded on an incomplete one.

The necessity for public park areas to which the people may have free and constant access is everywhere conceded. To safeguard the public health a recreational ground must be provided. When the legislature in its broad discretion adopts a procedure whereby the resident electors of any district may secure to themselves such a benefit, it is difficult to see wherein the object achieved under the law is of such a state-wide nature as to make local taxation an inequality before the law.

It is obvious that a park area in the Cleveland district will be used primarily by the residents of that district, and that the benefits resulting from the creation of the park will therefore be local rather than general.

The language of Justice Hughes in *Houck v. The Little River Drainage District,* 239 U. S. 254, at 262 applies to this situation with peculiar force.

> "In view of the nature of this enterprise it is obvious that, so far as the Federal Constitution is concerned, the State might have defrayed the entire expense out of state funds raised by general taxation or

it could have apportioned the burden among the counties in which the lands were situated and the improvements were to be made. *County of Mobile v. Kimball*, 102 U. S. 691, 703, 704. It was equally within the power of the State to create tax districts to meet the authorized outlays. The legislature, unless restricted by the state constitution, can create such districts directly, or, as in this case, it may provide for their institution through a proceeding in the courts in which the parties interested are cited to appear and present their objections, if any. The propriety of a delegation of this sort was a question for the State alone. And with respect to districts thus formed, whether by the legislature directly or in an appropriate proceeding under its authority, the legislature may itself fix the basis of taxation or assessment, that is, it may define the apportionment of the burden, and its action cannot be assailed under the Fourteenth Amendment unless it is palpably arbitrary and a plain abuse. These principles have been established by repeated decisions. *Hagar v. Reclamation District*, 111 U. S. 701, 709; *Spencer v. Merchant*, 125 U. S. 345, 353, 356; *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 167, 168; *Bauman v. Ross*, 167 U. S. 548, 590; *Parsons v. District of Columbia*, 170 U. S. 45, 52; *Williams v. Eggleston*, 170 U. S. 304, 311; *Norwood v. Baker*, 172 U. S. 269, 278; *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 343; *Wight v. Davidson*, 170 U. S. 371, 379; *Wagner v. Baltimore*, decided this day, *ante*, p. 207."

It is true that a conservation of natural resources inures to the good of the state at large. It is not true that such a conservation does not also inure to the benefit of the district within which such conservation is made. Thus the conservation of forests is one means of flood control; the proper control of submerged and swamp lands is a good health measure; the regulation of lakes may be for a recreational purpose; and the conservation of streams will improve power and drainage facilities.

Under these circumstances the 14th Amendment to the Federal Constitution does not prevent the creation of a taxing district to assume the cost of maintaining a park and conservation area. In *County of Mobile v. Kimball*, 102 U. S. 691 (1880), the Supreme Court held that it was constitutional to assess the entire cost of a harbor improvement upon a local district even though the result of the improvement was a benefit on the entire state.

In the opinion by Justice Field, the constitutional objections were disposed of in the following language (p. 703):

> "Here the objection urged is that it fastens upon one county the expense of an improvement for the benefit of the whole State. Assuming this to be so, it is not an objection which destroys its validity. When any public work is authorized, it rests with the legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray its costs shall be raised. It may apportion the burden ratably among all the counties, or other particular subdivisions of the State, or lay the greater share or the whole upon that county or portion of the State specially and immediately benefited by the expenditure.
>
> "It may be that the act in imposing upon the county of Mobile the entire burden of improving the river, bay, and harbor of Mobile is harsh and oppressive, and that it would have been more just to the people of the county if the legislature had apportioned the expenses of the improvement, which was to benefit the whole State, among all its counties. But this court is not the harbor, in which the people of a city or county can find a refuge from ill-advised, unequal, and oppressive State legislation."

A similar question was raised in *Charlotte, Columbia & Augusta R. R. Co. v. Gibbes*, 142 U. S. 386 (1892). In this case the statutes of South Carolina required the salaries and expenses of the State Railroad Commission to

be borne by corporations owning and operating railroads within the state. It was contended that this was a denial of equal protection because specific parties were compelled to bear the expense of an act beneficial to the state at large. The court said (p. 394):

> "There are many instances where parties are compelled to perform certain acts and to bear certain expenses when the public is interested in the acts which are performed as much as the parties themselves. Thus in opening, widening or improving streets the owners of adjoining property are often compelled to bear the expenses, or at least a portion of them, notwithstanding the work done is chiefly for the benefit of the public. So, also, in the draining of marsh lands, the public is directly interested in removing the causes of malaria, and yet the expense of such labor is usually thrown upon the owners of the property. Quarantine regulations are adopted for the protection of the public against the spread of disease, yet the requirement that the vessel examined shall pay for the examination is a part of all quarantine systems. *Morgan v. Louisiana,* 118 U. S. 455, 466. So, the expense of a compulsory examination of a railroad engineer, to ascertain whether he is free from color blindness, has been held to be properly chargeable against the railroad company. *Nashville, Chattanooga & St. Louis Railway v. Alabama,* 128 U. S. 96, 101. So, where work is done in a particular county for the benefit of the public, the cost is oftentimes cast upon the county itself instead of upon the whole State. Thus, in *County of Mobile v. Kimball,* 102 U. S. 691, it was held that a provision for the issuing of bonds by a county in Alabama could not be declared invalid, although it imposed upon one county the expense of an improvement in which the whole State was interested. In such instances, where the interests of the public and of individuals are blended in any work or service imposed by law, whether the cost shall be thrown entirely upon the individuals or upon the State or be apportioned between them, is matter of legislative direction."

The terms of the Ohio Park Board law (G. C. 2976-4) make ample provision for a hearing prior to the establishment of the park district. While the act does not say in express terms that the possibility and degree of local benefits shall be considered therein, this can be assumed. The general provisions of the act including the right of resident electors to petition for the creation of a district, the right to levy taxes upon the district, the right of the probate judge to exclude portions of a proposed district after the hearing, and the fact of the hearing itself, lead to the conclusion that the Legislature must have intended the hearing to be upon the benefits which would result to the district.

For his contention that a park district under the Ohio Park Board law is a state improvement, the cost of which should not be cast upon taxpayers within the park district, appellant relies principally upon the case of *Wasson et al. v. Commissioners*, 49 O. S. 622 in which the court held invalid an act authorizing counties to raise money to secure the location of the Ohio Experiment Station as being in violation of Section 2, Article XII of the Ohio Constitution requiring that all taxes for general revenue for the state must be levied by uniform rule upon all taxable property therein. It does not appear that the court would have declared the law invalid, but for the uniform rule proviso in the State Constitution.

Furthermore, the principal consideration which induced the court in the *Wasson* case to hold that the Experiment Station was a state project was the fact that the Board having control of the Station was a State Board and that after the County Commissioners had paid to the Treasurer of State the proceeds of the local bond issue, the County authorities ceased to have any part in the future of the enterprise. The situation with respect to a park district is the

exact opposite. The district is organized, officered and controlled by the locality which finances its operations.

This conclusion is supported by *Embree v. Kansas City and Liberty Boulevard Road District,* 240 U. S. 242 (1916) in which a taxing district was established after a hearing under a statute which did not expressly provide that benefits should be determined. The court makes the following statement which seems to apply with full force to the Ohio Park Board law (p. 248):

> "True, the statute does not in terms say that lands which will not be benefited shall be excluded or that only such as will be benefited shall be included, but it does say that the court shall make such change in the proposed boundaries 'as the public good may require.' In the presence of this comprehensive direction there can be no doubt that the legislature intended to authorize and require the county court to adjust the boundaries so they would include only such lands as might be reasonably expected to be benefited by the improvement of the district roads and therefore might be properly charged with the cost of that work. That there is an inseparable union between the public good and due regard for private rights should not be forgotten."

The fact that the Park Board is empowered under the Ohio Park Board Law to acquire lands outside the district, the cost of which is assessed upon property within the district, is not a denial of equal protection.

The provision of the Ohio Park Board Law (G. C. 2976-7) which empowers the Park Board to acquire land without the district, states that it should do so "on behalf of said district." It therefore appears that the intention of the Legislature in giving the Park Board this power was to enable the Park Board to go outside the district and acquire land only when the needs within the district re-

quire them to do so. The result of their action therefore is a benefit to the district for which the district not only can, but should be taxed. Where the area outside the established district is sought to be improved for the benefit of property outside the established district there is a provision (G. C. 2976-10d) for annexing such property, and making it a part of the park district. The two provisions as thus viewed together clearly show what the Legislature intended the powers of the Park Board to be.

The situation is comparable to the dual power of a municipality to either annex property to its corporate limits or to go beyond such limits and acquire land for a golf course, industrial home, sewage disposal plant, etc.

In concluding the argument contained in his brief, appellant cites *Funkhouser, et al. v. Randolph, et al.*, 287 Ill. 94, 122 N. E. 144. The attention of the Court is respectfully called to the fact that the four paragraphs cited do not follow one another in the reported opinion, and that the conclusions contained in the third paragraph quoted in no respect apply to the facts contained in the first and second paragraphs quoted.

Moreover each of these conclusions was based on the provisions of the Illinois Constitution of 1870, and not on the Fourteenth Amendment to the Constitution of the United States as a casual reading of appellant's brief might imply.

CONCLUSION.

Summarizing the contentions of this brief, we urge the rejection of the appellant's claims upon the grounds of the untimeliness of the raising of the federal questions; the lack of substantiability thereof; the application of the rule of *stare decisis* as it relates to the similarity of issues disposed of in similar cases by this Court; the recognition

of the State's right to create its own Supreme Court and to regulate the procedure thereof; and the lack of judicial character of the questions raised in relation thereto and upon the further ground of the public policy of the State in relation to the exercise of its inherent police power.

The judgment of the Supreme Court of the State of Ohio should be sustained.

Respectfully submitted,

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